IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 21 of 2002

in

COMPANY PETITION No 215 of 2001

with

CIVIL APPLICATION No 90 of 2002

AND

O.J.APPEAL NO. 22 of 2002

in

COMPANY PETITION NO. 216 of 2001

with

CIVIL APPLICATION NO. 91 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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ESSAR STEEL LIMITED

Versus

GRAMERCY EMERGING MARKET FUND

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Appearance:
MR. C. ARYAMA SUNDARAM, SR. ADVOCATE WITH
MS. SURANYA AIYAR AND MS. ASHA MAHANT, ADVOCATES
FOR NANAVATI ASSOCIATES FOR THE PETITIONERS

MR. P. CHIDAMBARAM, SR. ADVOCATE WITH MR. MIHIR JOSHI,
ADVOCATE FOR THE RESPONDENTS

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CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 17/10/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These two appeals are directed against the common order of the learned Single Judge made on 20th March 2002 rejecting the preliminary objection against the maintainability of the Company Petitions, by holding that the respondents - original petitioners were the creditors and therefore, entitled to present the petitions and simultaneously directing that the Trustee should be joined as a party to these petitions. These two appeals have been heard finally at the request of both the sides.

2. Both the appeals involve common points and have been argued together. Both the Company Petitions also involve common factual background and identical prayers. There were three Company Petitions heard together in which the common order was made. When these appeals were being heard, it was pointed out that the Company Petition No. 240 of 2001 was already withdrawn and in this view of the matter, the learned Senior Counsel for the appellant stated that since the Company Petition No. 240 of 2001 was withdrawn, he wanted to withdraw O.J. Appeal No. 23 of 2002 which was also placed along with these appeals. Accordingly, O.J. Appeal No. 23 of 2002 was dismissed as withdrawn by our order dated 24-9-2002 made in that appeal.

3. The facts relevant for the purpose of the present

appeals are in a narrow compass.

3.1 The respondents - original petitioners (hereinafter referred to as "the petitioners") claimed to be the creditors by virtue of being beneficial owners of the Global Notes which were offered in exchange for the earlier Global Notes by the appellant Company (hereinafter referred to as "the Company"). The petitioners have prayed for winding up of the Company on the ground that it was unable to pay its debts, and that it was just and equitable in the circumstances mentioned in the petition to compulsorily wind it up. The petitions were presented after issuing notice of demand on 12th / 16th April 2001 in respect of the dues of the petitioners and after the Company failed to pay its debts within the stipulated period.

3.2 Earlier, the Company had issued Floating Rate Notes (which were a type of Promissory Notes as stated in the petition) in the form of Global Notes. The FRNs matured on July 15, 1999 and since there were defaults committed in paying the dues in connection with those Notes the Company came out with an offer of New Notes. The New Notes were also Global Notes being in "Series "A" Floating Rate Unsecured Notes due 2005" and "Series "B" Floating Rate Unsecured Notes due 2005". It also issued "Amended and Restated Unsecured Notes due 2005", with which we are not concerned. The New Notes thus took form of Global Notes in substitution for the issue of definitive notes after the exchange was completed on 15th September 2001 pursuant to the Letter of Consent given by the Old Note holders. As per the arrangement usual with such issues, the Trustees were appointed for the New Notes under separate Trust Deeds in respect of Series "A" and Series "B" having similar terms and conditions.

3.3 The interest was payable quarterly to the beneficial owners on their respective entitlement in the Global Notes. There was also arrangement to pay interest which was due under the Old Notes to the New Note holders described as "extraordinary interest". The dates for payment of such interest were fixed. The first payment of interest which was due on October 31, 2000 for the period from August to October was made by the Company to those who were having entitlement in the Global Notes including the petitioners. Similarly, interest which was due on 31st January 2001 for the period from November 2000 to January 2001 was also paid to the respective beneficial owners on their proportionate entitlement in the Global Notes. There were, however, committed defaults in respect of the "extraordinary interest" which

had become payable on 31st January 2001. According to the petitioners, in view of the defaults having been committed as described in Condition 9(a) of the New Notes, the Trustee notified the Company by its letter dated 15th February 2001 that an event of default had occurred as a result of its failure to pay "extraordinary interest" in full. The trustee also stated that if the amount was not paid by the close of business on February 22, 2001, the notice would be served that the New Notes were due and payable for the principal amount together with all accrued but unpaid interest. The Company, however, did not make any payment and thereupon, the Trustee served a notice by its letter dated February 23, 2001 under Condition No. 9(a) of the New Notes whereby the New Notes were made immediately due and payable at their principal amount together with accrued interest. Since the Company did not respond, the respondents original petitioners served demand notices on the Company in accordance with section 434(1)(a) of the Companies Act, 1956 and the present petitions were filed seeking compulsory winding up of the Company and appointment of the official liquidator.

4. Before the learned Company Judge, a preliminary objection was raised against the maintainability of the Company Petitions on behalf of the Company on four grounds, as mentioned in paragraphs 4 and 10 of the impugned order, and these are reproduced hereunder for the sake of convenience :

"(1) The petitioners are not Noteholders.

(2) Even if the petitioners are Noteholders, they are not debenture holders or holders of any security as contemplated by the Companies Act read with the Securities Contracts (Regulation) Act, 1956.

(3) In any case, the petitioners are not creditors under section 439(1)(b) of the Companies Act, as the petitioners cannot give a valid discharge but only the trustee can give a valid discharge. Hence, only the trustee is a creditor of the respondent - Company.

(4) Even if the petitioners are creditors, they do not have any enforceable claim in view of clause (6), condition No.13 in the Terms and Conditions of the Note providing for enforceability of the

claims only through the trustee."

5. The case of the Company, as per its reply, is that the petitioners are not the creditors of the Company, and that they have no locus standi to file the petitions. According to the Company, from a plain reading of clause 13 of the Terms and Conditions of the Note, it was apparent that any legal proceeding, if at all, against the Company can be initiated by the Trustee alone and that individual Noteholders do not have any locus to file the petition, as stated in paragraph 5 of the affidavit-in-reply. According to the Company, the notice purported to have been sent under section 434 of the said Act (Annexure "C" to the petition) was sent by certain Noteholders in their individual name and the present petition has been filed by these Noteholders in their individual names and not in the name of the Trustee, as envisaged by the Trust Deed. In paragraph 6 of the affidavit-in-reply, it is submitted by the Company that the Trustees are necessary party to this petition, since the Notes were governed by the Trust Deed and the Trustee was empowered to receive all the moneys in respect of the Notes or any other amounts payable by the issuer Company. It is stated that the Trustees ought to have been joined as necessary party and that the presence of the Trustee is essential to decide the petitions. According to the Company, the petitioners have wrongly invoked the jurisdiction of this Court to harass and coerce the Company though there is an equally efficacious remedy available to the petitioners to recover their dues. The case of the Company is that its present inability to service its creditors in full is arising out of a steep fall in the selling prices in HRC both in the domestic as well as in the external markets and consequent temporary mismatch in cash flow. In paragraph 40 of the affidavit-in-reply, it has been stated that the Company has always acted in a bonafide manner and that despite depressed markets, the Company has made several payments to Noteholders which have been admitted by the petitioners in the present petitions.

6. The learned Company Judge, keeping in mind the nature of the Global Notes and type of interests that these beneficial owners had in those Notes and all other relevant material which was placed before His Lordship negatived the preliminary objection holding that: the petitioners were Noteholders in as much as the Company had recognised the concept of New Beneficial Owners of the debts representing the amounts which they had in their respective accounts; that the covenants made by the Issuer Company to the Trustee are for the benefit of the

trustee as well as the Noteholders according to their respective interest; that it made no difference whether or not the respondent Company knew about the names and debt amounts of individual Noteholders like the petitioners, because, the very nature of the Global Notes did not require such details should be made known to the Company; that in the letter dated 19-2-2002, the Trustee had not contended that the petitioners were not Noteholders or that they could not give a valid discharge to the Company; that the petitioners as debenture holders were creditors of the Company, and that in an action by a debenture holder against the Company, the trustee is a necessary party and therefore, should be so joined; that once the mechanism under Condition 13 of the Notes was followed, the creditor can exercise its right of presenting a winding up petition; and that Condition 13 will not affect the maintainability of the winding up petitions in context of the locus standi of the petitioners, as the conditions specified in sections 433(a), 434 and 439 (1)(b) and 439(2) are satisfied, and overruled the four preliminary contentions while holding that the Trustee was a necessary party to the proceedings. The said order has been challenged before us.

7. The learned Senior Counsel appearing for the appellant contended that the petitioners were not Noteholders. The holders of the Note are only those in whose names the Notes are registered. He pointed out that the Notes are registered in the names of the nominees of the Depository Trust Company (DTC). According to him, these are Global Notes in a definitive form of the type not usually found in this part of the world. Such Note is deposited with the DTC and registered in the name of its nominee and therefore, there cannot be any holder other than the nominee in whose name the Note is registered. He further argued that even if the petitioners are to be treated as Noteholders, they are not holders of "debentures" or holders of "any securities" as contemplated by the said Act read with the provisions of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as "SCR Act" for short). He then argued that the petitioners are not creditors under section 439(1)(b) of the said Act, because, they cannot give a valid discharge and only the Trustee can give a valid discharge. Therefore, the Trustee alone would be a creditor of the company. He then contended that even if the petitioners are to be treated as creditors, they have no enforceable claim under the terms and conditions of the Notes and the Trust Deed which terms and conditions could be enforced only

through the Trustee. He submitted that sections 439(1)(b) and 439(2) are mutually exclusive, and section 439(1)(b) does not apply to "debenture" which would be governed by section 439(2). It was further contended that right under section 433 read with section 439 of the Act is a right of action which pre-supposes existence of a cause of action. If cause of action does not arise, there can be no question of any conflict between the provisions of the said Act and the bar imposed under the terms of the Trust Deed against initiating legal proceedings. It was submitted that a term of contract barring any person other than the Trustee from bringing an action can not be said to be in conflict with the provisions of the Companies Act. Moreover, whether a person is a creditor or not should be judged by the English Law since the documents are governed by the English Law as per the stipulations contained therein. It was submitted that the security would have to be proceeded as a whole and no fiction of holder can be created, because, trading is in the interest of rewards of a specific security and not in the security itself. It is submitted that if the Note is a debenture, the question of its being any other security can never arise.

7.1 In support of his submissions, the learned Senior Counsel relied upon the following decisions :

[a] The decision of the Court of Appeal Virgin Islands, in Civil Appeal No. 3 of 2001 rendered on June 21, 2001, was cited to point out that the Court repelled the contention that the trustee could not present a winding up petition, holding that, in view of the relevant provisions of law reproduced in paragraph 8 of the judgement, the powers and options of the trustee included the right in it to petition the Court to wind up the Company on the basis of an undisputed debt. In paragraph 10 of the judgement, the Court accepted the submission of the Counsel that the Noteholders themselves, had no right of enforcement of the payment of monies due from the appellant under the Notes and the Indenture, and they did not interact with the company since such interaction was for the respondent as trustee. It will be noticed from the provisions of section 6.7 of the Act with which the Court was concerned, as reproduced in paragraph 8 of the judgement that, while providing in respect of suits for enforcement, it was specifically laid down that "in case an event of default has occurred, has not been waived and is continued,

the trustee may in its discretion proceed to protect and enforce the rights vested in it by this Indenture by such appropriate judicial proceedings as the trustee shall deem most effectual to protect and enforce any such right, either at law or in equity or in bankruptcy or otherwise .....". Dealing with "Limitation of suits by Noteholders", section 6.9 was provided that "No Holder of any Note shall have any right by virtue or by availing of any provision of these Indenture to institute any action or proceedings at law or in equity or in bankruptcy or otherwise.....". The decision, therefore, was rendered in context of the provisions of law which prevented the Noteholders from bringing about bankruptcy proceedings and enabled only the trustee to file them.

[b] The decision of the Federal Court of Arbitration in Interchase Corporation Limited, rendered on 10th September 1993, reported in (1993)44 FCR 501, was cited to point out that it was held in paragraph 27 of the judgement that, as between the company, the trustee and the Noteholders, it was only the trustee who had any entitlement at law to make any claim on the company for payment of moneys due by it by way of principal and interest in respect of the Notes. It was that, it was the trustee itself rather than the Noteholder who was the company's creditor within the meaning of the term in section 473(3)(b)(i) of the Corporations Law Reform Act, 1992. That was a provision providing for remuneration of a liquidator by way of percentage or otherwise providing that if there was no committee of inspection or liquidator and the committee of inspection fail to agree, the remuneration would be as may be determined by a resolution passed at a meeting of the creditors by a majority of the creditors present and voting. The Court acceded to the request on behalf of the liquidator that the notice of motion be amended to include a claim for a declaration that the provisions of section 473(3)(b)(i) for determining the liquidator's remuneration had been sufficiently complied with and adjourned the matter for further hearing of the motion to enable service of the material to be effected on the trustee.

[c] The decision of the Supreme Court in Rajahmundry Electric Supply Corporation Ltd. v. A.

Nageshfswara Rao, reported in AIR 1956 SC 213 was cited for the proposition that validity of a provision must be judged on the facts as they were at the time of its presentation. According to the learned Senior Counsel, since the Trustee was not a party respondent to the petition nor had he presented the petition as a creditor, the defect in the petitions could not be cured by directing the Trustees to be impleaded as parties -respondents.

[d] The decision of the Supreme Court in Harinagar Sugar Mills Co. Ltd. v. M.W.Pradhan, reported in 36 Company Cases 426 (SC) was cited for the proposition that, unless the court receiver was a creditor by assignment or otherwise to whom the company is indebted, he cannot maintain an application under section 439 of the Indian Companies Act. The Supreme Court held that, in terms of clause (d) of Rule 1 of Order XL of the Code of Civil Procedure, a receiver could file a petition for winding up of a debtor company for realisation of the properties, movable and immovable, including debts, of which he was appointed as receiver. It was held that if for the proper and effective management of the estate of which the receiver was appointed, the court thought it fit to confer power on him to take steps for the winding up of the debtor company, the court could give necessary directions in that regard, under Order XL, Rule 1(d). It was further held that the receiver was a creditor within the meaning of section 439(1)(b) of the Companies Act, 1956, and was, therefore, competent to maintain the petition for winding up of the company.

[e] The decision of the Supreme Court in Kudkanjee Timmarsa Pai v. Kanjarpane Subha Rao, reported in AIR 1928 Madras 256 was cited for the proposition that the manager with respect to the transaction of security must be regarded in law only as a trustee and proper course would be a suit for the enforcement of a trust against the trustee or for the administration of the trust. In that case, defaulting subscriber of "kuri chit" had executed security in favour of the management. It was held that higher bidder was not entitled to enforce security against defaulter but manager must sue for enforcement of a trust.

[f] The decision of the Supreme Court in M/s Howrah Trading Co. Ltd. v. Commissioner of Income Tax, reported in AIR 1959 SC 775 was cited for the proposition that the Company recognises no person except one whose name is on the register of members, upon whom alone calls for unpaid capital can be made and to whom only the dividend declared by the company is legally payable. It was held that, between the transferor and the transferee, certain equities arise even on the execution and handing over of "a blank transfer", and among these equities is the right of the transferee to claim the dividend declared and paid to the transferor who is treated as a trustee on behalf of the transferee. These equities, however, do not touch the company, and no claim by the transferee whose name is not in the register of members can be made against the company, if the transferor retains the money in his own hands and fails to pay it to him.

[g] The decision of the Supreme Court in M.C.Chacko v. The State Bank of Travancore, reported in AIR 1970 SC 504 was cited to point out that, it was held by the Supreme Court that, a person not a party to a contract cannot, subject to certain well recognised exceptions, enforce the terms of the contract. The Supreme Court held that the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. In paragraph 9 of the judgement, the Supreme Court held that, it must be taken as well settled that except in the case of a beneficiary under a Trust created by a contract or in the case of a family arrangement, no right can be enforced by a person who is not a party to the contract.

[h] In re Dunderland Iron Ore Company, Limited, reported in (1909) 1 Chancery Division 446 was cited for the proposition that the debenture stockholders whose interest was in arrear were not creditors and were not entitled to present a winding up petition as creditors. It was contended; "They are not debenture - holders. They are debenture stock holders, .....". It was held that there was no covenant by the company with them and the convent in the trust deed was between the company and the trustees.

There was no covenant in the stock certificate, and there was no statement therein beyond a copy of the conditions contained in Schedule 1 of the trust deed. It was held that the debentures stock holders, although cestuis que trust, are not creditors of the company, and they had no direct contract with the company and were not entitled to present a winding up petition. The Court observed, "It is not a case in which there is any negotiable security or any coupons issued".

[i] In re Uruguay Central and Hygueritas Railway Company of Monte Video, reported in (1879) Vol.XI Chancery Division 372, was cited for the proposition that, the bond with which the Court was concerned, did not make the holder a creditor either at law or in equity. In that case, a Limited Company had issued Mortgage Bonds in order to raise money and by the deed, it covenanted with the trustees that all the bonds should rank pari passu, and that every bond should entitle the holder to a fully paid up ordinary share in the company as a "bonus share"; that the company would pay to the trustees the interest on the bonds, and also an annual sum by way of sinking fund for the discharge of the bonds, and that the bond debt, interest, and sinking fund should be a charge on the railway. The Court held that it was not prepared to hold that this form of document, this bond, makes the person who holds the bond, or who holds a coupon, a creditor either at law or in equity.

[j] The decision of the Supreme Court in State of Kerala v. V.R. Kalliyanikutty, reported in (1999) 3 SCC 657 for the proposition that an amount "due" normally refers to an amount which the creditor has a right to recover.

[k] The decision of the Supreme Court in Shah Babulal Khimji v. Jayaben D. Kania, reported in AIR 1981 SC 1786 was cited to point out that, whenever a Tril Judge decides a controversy which affects valuable rights of one of the parties, it must be treated to be a judgement within the meaning of Clause 15 of the Letters Patent. Accordingly to the learned Senior Counsel, important issues came to be decided under the impugned order and therefore, the appeal would lie against it.

8. The learned Senior Counsel appearing for the respondents - original petitioners raised a preliminary objection against the maintainability of these appeals contending that an appeal cannot lie under section 483 of the said Act against the impugned order, because, it is not an appealable order. It was submitted that when no appeal can be filed against the order of admission of a winding up petition, it cannot lie at this anterior stage. The impugned order according to him does not affect any right of the petitioners and being of procedural nature only, no appeal would lie against it. The learned Senior Counsel, supporting the reasoning of the learned Single Judge in overruling the four preliminary contentions which were raised on behalf of the Company, argued that the petitioners were creditors within the meaning of section 439(1)(b) of the said Act. Though the Global Note was in the name of the nominee of the DTC, trading was done in the Notes and portions or entitlements of the Notes by persons owning them whose names were recorded in the records of the DTC, its participants, clearing system and account holders and the principal as well as interest was payable to such investors like the petitioners who were the beneficial owners of the Note in proportion to their interest in the Note. It was argued that all these Global Notes in the Series "A" and "B" were issued by the Company in the exchange offer, having defaulted in discharging its debts under the similar earlier Global Notes, and, consent letters of the beneficial owners i.e. the investors of the Old Notes were solicited and New Notes were issued. Under the terms and conditions of payment, the name of each beneficial owner of a particular nominal amount of the Note was to be shown in the records and payments of principal and interest on such Note were required to be credited in the accounts of the respective beneficial owners. It was submitted that neither the nominee of the DTC, or the DTC nor the Trustee invested any amount in the Notes and the Global Note was owned by the investors i.e. the beneficial owners to the extent of their respective share or entitlement as reflected in the records. The Trust Deed was executed for the benefit of these investors who were to be paid the principal and interest by the issuer company as per the arrangement made by it. In fact, these petitioners were indeed paid interest which fell due on 31st October 2000 and 31st January January 2001. There was, however, default committed in paying the "extraordinary interest" which was the default interest of the previous Global Note entitlements of the petitioners and the Trustee had issued event of default and demand notices to the

company. The petitioners were therefore creditors being the beneficial owners entitled to the amounts due in respect of the interest held by them in the Notes. It was, in the alternative, argued that the Note was a security which would be a debenture under section 439(2) read with section 2(12) of the said Act and therefore, the petitioners being holders of right and interest in such security, which was included in the meaning of debenture, were, in any event, deemed to be creditors for the purpose of section 439(1)(b) and could therefore present the winding up petitions as the creditors of the Company. It was then argued that a winding up petition was outside the purview of any contractual arrangement between the Company and the Trustee and could be presented by the petitioners as creditors being the beneficial owners of interest in the Notes, since the restrictions under clause 6 of the Trust Deed and clause 13 of the Terms & Conditions of the Notes was only in respect of the enforcement of the Terms & Conditions of the Trust Deed and the Notes, and, the enforcement clause did not refer to any winding up proceedings. The nature of the winding up petition was entirely different from an action to enforce the terms & conditions of the Trust Deed and the Notes, argued the learned Senior Counsel. It was submitted that a winding up proceeding was a proceeding in rem, and not in personam like a recovery proceeding filed on the basis of terms and conditions of the Trust Deed and the Notes. Referring to the correspondence on record between the Company and the Trustee and the lawyer of the petitioners as well as the various paragraphs of the reply filed by the Company, it was argued by the learned Senior Counsel that the Issuer company had described the petitioners as Noteholders. Even the Trustee was required to call a meeting of the "Noteholders" under clause 12 of the Conditions incorporated in the Notes. Since the entitlement of the petitioners and other investors in the Global Notes were held in book-entry ownership form electronically maintained, it was holding of interest in the Global Note in a dematerialized form and in that sense, the petitioners were holders of Global Notes in demat forms entitled to transfer such interest, argued the learned Senior Counsel.

8.1 In support of his contentions, the learned Senior Counsel placed reliance on the following decisions :

[a] The decision in Shankarlal Aggarwala v. Shankarlal Poddar, reported in 35 Company Cases 1 was cited to point out that, it was held by the Supreme Court that an order made in the winding

up of a company by a Single Judge of the High Court to be appealable under section 202 of the Indian Companies Act, 1913 (which corresponded to section 483 of the said Act), it was not necessary that it must satisfy the requirements of clause 15 of the Letters Patent, that it should a "judgement" within the meaning of that clause. In that case, the Court was concerned with the order of confirmation of sale in course of administration where a company was ordered by the High Court to be wound up. The Company Judge had passed the order confirming the same, but the Division Bench in appeal set aside the order directing the liquidator to re-sell the property. The Supreme Court held that the order of the Company Judge was, in the circumstances of the case, a judicial order and not an administrative order and was, therefore, not inherently incapable of being brought up in appeal.

[b] The decision of the Madhya Pradesh High Court in Achal Alloys v. Uco Bank, reported in (1996) Comp. LJ 287 (MP) was cited to point out that, it was held in paragraph 11 of the judgement, that it was not necessary to decide the question of tenability of the appeal under section 483 of the Act, because, the order under challenge was one of admission, and the matter was still to be heard and decided by the Company Judge and the merits of the matter were yet to be examined. The Court observing that there was no order or decision concerning the matter of winding up of the company one way or the other and the order did not prejudice the appellant.

[c] The decision of the Karnataka High Court in Miland Exports Pvt. Ltd. v. A.V. Venkatanarayana, reported in (1995) Vol.83 Company Cases 585, in which the Court observed that the words "any order" in section 483 of the Act shall have to be understood as an order which affects the rights of the person who invokes the appellate jurisdiction of the Court. Unless the right of a party is affected, the question of invoking the appellate jurisdiction would not arise. It was held that, in the context of section 483 and the procedure prescribed for advertisement of a Company Petition after admission, an order admitting the petition could be construed as an order governing procedural matters only. This observation was made on the

basis of the decision of the Supreme Court in National Conduit's case (1967) 37 Company Cases 786, pointing out that even after the petitioner was admitted, it was open to the company to move the court that the petition shall not be advertised.

[d] The decision of the Bombay High Court in Bachharaj Factories Ltd. v. Hirjee Mills Ltd., reported in (1955) 25 Company Cases 227 was cited for the proposition that a secured creditor or debenture stock holder to whom the company was indebted in a sum presently due can demand payment of his debt, and if default be made can present a petition and obtain an order for winding up of the company and this remedy he was entitled to pursue whether he was a registered holder of a debenture or the holder of a debenture to bearer. The Court negatived the objection that the only privity that existed with regard to the petitioners' claim was between the company and the debenture trustees and therefore, the petitioners were not the creditors of the company and they cannot maintain the petition. (See pages 248 and 249 of the report).

[e] The decision of the Bombay High Court in Solapur Spinning & Weaving Co. Ltd. In Re, reported in (1965) 35 Company Cases 165 was cited for the proposition that section 439 (2) of the said Act confer unconditional absolute right on all debenture holders to file application for winding up as creditors of the company. In condition No.9 of the Trust Deed which was being considered by the Court, it was provided that all remedies for the recovery of the principal money and interest secured by the debentures were exclusively vested in the trustees on behalf of the debenture holders. The Court considered the decision in Dundarland Iron Ore Co. Ltd., but held that, under the provisions of sub-section (2) of section 439, the contention of the petitioner that the petitioner was not entitled to maintain the petition on the basis of that decision, was liable to be negatived.

[f] The decision of the Calcutta High Court in Calcutta Safe Deposit Co. Ltd. v. Ranjit Mathurdas Sampat, reported in (1971) 41 Company Cases 1063 was referred for pointing out that it was held that the definition of the word

"creditors" had undergone a radical change so as to include therein a secured creditor and debenture holders and that such a creditor had a right to present a winding up petition under section 439(2). The Court, after considering the decisions in Bachharaj Factories Ltd. (supra), Dundarland (supra) and other cases, held that, a special right has been given to debenture holders and they should be deemed to be the creditors within the meaning of clause (b) of sub-section (1) of section 439 of the Companies Act in view of the new definition of the words "creditors" introduced in the said Act of 1956. It was held that the debenture holders had a right to present the petition for winding up as recognised by the statute.

[g] The decision of the Bombay High Court in Narottamdas Trikamdas Toparani v. Bombay Dyeing & Manufacturing Co. Ltd., reported in (1990) 68 Company Cases 300 was cited to point out that the High Court, after elaborately considering the decisions of the Chancery Division in Dunderland (supra), Uruguay Central & Hygueritas Railway Co. of Monte Video (supra), held that there were number of cases where the English Courts had construed debenture holder as a creditor of the company whereever there had been such a direct convenant between the company and the debenture holder. It was held that, in case of Bachharaj Factories Ltd. (supra), a Division Bench of the Bombay High Court had distinguished the case of Dundarland (supra), and held that, in the case before the Division Bench, there were debentures and not stock certificates and that the debentures contained a personal convenant by the mills to pay the debenture holders. The Court held that, in view of the express provision now contained in section 439(2), there can be no doubt that a debenture holder is a creditor of the Company for the purpose of presenting a winding up petition.

[h] The decision of the Madras High Court in Hind Mercantile Corporation P. Ltd. v. J.H. Rayner & Co. Ltd., reported in (1971) 41 Company Cases 548, was cited to point out that the question for decision in a company petition was not a matter that had arisen out of or under the contract and that the point for decision in a company petition is whether the company was unable to pay the

debt, which question cannot be decided by an arbitrator by virtue of the arbitration clause in the agreement. It was held that the company petition was, therefore, not liable to be stayed.

[i] The decision in ITC Agro Tech Ltd. v. Asha Agro Industries Ltd., reported in (1998) 4 C.L.J. 18 was cited for the proposition that the right to file a winding up petition statutorily conferred cannot be obliterated by an agreement between the parties.

[j] The decision of the Supreme Court in Haryana Telecom Ltd. v. Sterlite Industries India Ltd., reported in (1999) 5 SCC 688 was cited to point out that the Supreme Court held that the claim in a petition for winding up is not for money. The petition filed under the said Act would be to the effect that the company has become commercially insolvent and therefore, should be wound up, and that the power to order winding up of a Company is contained under the Companies Act and is conferred on the Court. It was held that an arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company.

[k] The decision in Re North Bucks Furniture Depositories Ltd. Ch.D. (May 1, 1939), All England Reports Annoted Volume II 49, was cited for the proposition that under section 170 of the Companies Act, 1929 which provided for application to court for winding up of the company to be petitioned by creditor(s); a local authority which was in a position to recover rates was a creditor within the meaning of that section, and therefore entitled to present the petition. In the process, the Chancery Division held that the section did not say that nobody shall petition unless he has a right to sue, but a person, to have the right to petition, must be a creditor - not necessarily a creditor, who can recover his debt by action, but a creditor.

[l] The decision in Levy v. Abercorrias Slate & Slab Company, reported in (1887) 37 Ch.D. 260 was cited to point out that a debenture means a document which either creates a debt or acknowledges it, and any document which fulfills either of these conditions is a debenture as opined by Chitty, J.

[m] The decision in reported in Laxman Bharmaji v. Emperor, AIR 1946 BOM. 18 was cited for the proposition that, in determining what is or is not a debenture within section 2(1) of the Companies Act, 1913, the Court is not bound to hold that an instrument is a debenture, because, it is called a debenture by the company issuing it, nor to hold that it is not a debenture, because, it is not so called by the company. The court must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion it can whether the instrument is or is not a debenture. It was held that a document which either creates a debt or acknowledges it and is one of a series may be dealt with as a debenture. A creation of a charge over the assets of the company issuing the debenture, though usual, is not an essential requisite of a debenture. On the facts before it, the Court held that the main features, in its opinion, showed that the Patron Bonds were debentures and the fact that all the holders get an equal chance to partake in the annual distribution of prizes out of the net interest released by the company.

[n] The decision of the Kerala High Court in Commissioner of Income Tax, Kerala v. Cochin Refineries Ltd. reported in 1982 T.L.R. 1981, was cited, again, on the question as to what is a debenture. The Court was concerned with loan agreements and posing a question for its consideration; "Are the loans in the real terms debentures?", the Court held that the said Act in section 2(12) gives an inclusive definition and debenture includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not. It was stated that the same is the meaning given in the English Companies Act, 1948. After considering the opinions of Lindley, J. in British India etc. Co. v. I.R.C., reported in (1881) 7 Q.B.D. 165, and Chitty, J. in Levy (supra), the Court held that a debenture is certainly a debenture which either creates a debt or acknowledges.

[o] The decision of the Chancery Division, In Re Woods Estate, reported in (1886) 31 Ch.D. 607 was cited on the aspect of incorporation by

reference and it was pointed out that the Court of Appeal held, "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all".

[p] The decision in Shamrao Parulekar v. District Magistrate, Thana, reported in AIR 1952 SC 324 was cited for the proposition that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed in such a way that there is no need to refer to the amending Act at all.

[q] The decision of the Supreme Court in Mahindra & Mahindra Ltd. v. Union of India, reported in (1979) 2 SCC 529 was referred to for the proposition that the effect of incorporation is as if the provisions incorporated were written out in the incorporating statute and were a part of it. The Court observed that legislation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting, incorporates provisions from an existing statute by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. It was held that, "Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter, there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporation statute".

[r] The decision of the Supreme Court in Onkarlal Nandlal v. State of Rajasthan reported in (1985) 4 SCC 404 was referred to point out that the opinion of Lord Esher, M.R. in In Re Wood's Estate that if a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into

the new Act just as if they had been actually written in it with the pen, or printed in it was approvingly referred. The Supreme Court interpreted Explanation II to sub-section (o) of section 2 of the Rajasthan Sales Tax Act, 1954 as if sub-section (2) of section 4 of the Central Sales Tax Act was written out verbatim in the Explanation, holding that, once sub-section (2) of section 4 is written out in the Explanation, there was no occasion or need to refer to the Central Act from which this incorporation was made or to its purpose or context.

[s] The decision in Voltas Ltd. v. Union of India and others, reported in 1995 (supp) (2) SCC 498 was cited for the proposition that, a deeming provision should given its full effect. It was held that legislature by a statute may create a legal fiction that something should be deemed to have been done which in fact and truth has not been done, but even the Court has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to. On the strength of this decision, it was contended that even if the Noteholders were not to be treated as holders of debentures under sub-section (2) of section 439, the question as to whether they were creditors under section 439(1)(b) was germane to the issue of the maintainability of the petition.

[t] The decision of the Supreme Court in Pankaj Mehra v. State of Maharashtra, reported in (2000) 2 SCC 756 was cited for the proposition that enforceability of a debt due from a company is not to be tested on the touchstone of the modality or the procedure provided for its realisation or recovery.

[u] The decision of the Supreme Court in Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd., reported in (2000) 5 SCC 515 was cited to point out that, in paragraph 11 of the judgement, the Supreme Court had observed that winding up order passed under the Companies Act is not the culmination of the proceedings pending before the Company Judge but is in effect the commencement of the process.

[v] The decision of Achal Alloys v. Uco Bank

reported in (1996) 1 Comp.L.J. 287 (MP) was cited to point out that it was held in a case where the order under challenge was one of admission that merits of the matter were yet to be examined and there was no order of decision concerning the matter of winding up of the company one way or the other, and therefore, the order did not prejudice the appellant. The Court found that the appeal under section 483 of the Act was devoid of substance. That was a case where the appeals were preferred at an interlocutory stage.

9. Raising the preliminary objection against the maintainability of the appeals, the learned Senior Counsel for the respondents - petitioners contended that when an order of admission is considered to be merely a procedural order which did not affect the rights of the parties, a fortiori, order made at a stage prior to that cannot affect the rights of the parties. No appeal, therefore, lies against the impugned order of the learned Company Judge under section 483 of the said Act. It will be noticed that the proposition that order admitting a winding up petition could be construed to be as an order governing procedural matter only, does not flow from the decision of the Supreme court in National Conduits (P) Ltd. v. S.S.Arora, reported in 37 Company Cases 786, as seems to have been assumed by the Karnataka High Court in Miland Exports Pvt. Ltd. (supra) which held that in the context of Section 483 and the procedure prescribed for advertisement of a company petition after admission, an order admitting a petition could be construed as an order governing procedural matters only and that is why the Supreme Court has also, in National Conduit's case (supra) pointed out that even after the petition is admitted, it is open to the company to move the court that the petition shall not be advertised.

9.1 In fact, the Supreme Court in Hind Overseas Pvt. Ltd. v. Raghunath Prasad, Jhunjhunwalla, reported in AIR 1976 SC 565, in paragraph 34 of its judgement, observed that, "Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the application has to be dismissed."

9.2 In Cotton Corporation of India Ltd. v. United Industrial Bank Ltd., reported in 55 Company Cases 423, the Supreme Court observed at page 440 that, "Therefore, the power is conferred on the judge before whom the

petition comes up for admission to issue pre-admission notice to the company so that the company is not taken unawares, and may appear and point out to the judge that the petitioner is actuated by an ulterior motive and presentation of the petition is a device to pressurise the company to submit to an unjust claim.

9.3 In Pradeshiya Industrial and Investment Corporation of Uttar Pradesh v. North India Petro Chemical Ltd., reported in (1994) 79 Company Cases 835, the Company Court had after notice and hearing, ordered admission of petition for winding up filed against the appellant company, but postponed advertisement. The Division Bench dismissed the appeal by the company, challenging the admission. On further appeal by special leave, the Supreme Court held that, the two basic requirements for a petition under section 433 (e) were, (i) there should be a debt, and (ii) the Company must be unable to pay such debt, and that if either of these requirements were absent, the petition was liable to be dismissed as the case for admission was not made out. It was also held that an order of admission, even without an order for advertisement is fraught with serious consequences to the company. As the two requirements were not made out in that case, the Supreme Court interfered by allowing the appeal and set aside the order of admission and dismissed the company petition.

9.4 The Karnataka High Court in Greenhills Exports (P) Ltd. v. Coffee Board, reported in (2001) 106 Company Cases 391, has held that if the petitioner in the company petition fails to make out, prima facie, existence of a "debt" and inability to pay such debt, the petition should be rejected; and if admitted, the order admitting the petition can be reversed in appeal. In Airwings Pvt. Ltd. v. Viktoria Air Cargo GmbH, reported in (1995) 84 Company Cases 688, the Division Bench of the Karnataka High Court observed that the exercise of arriving at a prima facie finding on the points enumerated earlier at a preliminary stage before admitting and advertising the petition must be undertaken after considering the rival versions of the petitioning creditor and the company and they would be purely tentative and prima facie findings which can be re-examined, if the need arises, in greater detail at the stage of trial of the company petition before passing the final order of winding up, if any, and after hearing the rival parties including the parties that might have appeared at the stage of trial pursuant to the advertisement. It was held that prima facie nature of the summary inquiry before admission or even after

admission and before advertisement would be for arriving at findings on the aforesaid points.

10. Section 483 of the Act provides for appeals from any order made, or decision given, in the matter of the winding up of a company. The expression "in the matter of the winding up of a Company" is wide enough to include a decision on the aspect of maintainability of a winding up petition taken by the Company Judge by rejecting the preliminary objection and, in the process, judicially determining the issues having bearing on the aspect of maintainability. The question of maintainability of a winding up petition goes to the very root of the matter and would not be a mere procedural aspect. The order of the learned Single judge is a judicial order as distinguished from a mere administrative order. The preliminary objection against the maintainability of the appeal on the ground of want of locus standi has a bearing on the jurisdiction of the Court to hear the matter at the behest of the petitioning creditors. The objectors say that the Court cannot hear it at the instance of this petitioner and when the Court rejecting the objection holds that it will hear the petition as it is maintainable at the instance of the petitioner, it assumes exercise of its jurisdiction by judicially determining the locus standi of the petitioner. If the petitioner had no locus, it could not have proceeded to exercise its jurisdiction. Therefore, if in appeal it is held that the petitioner did not have locus to invoke the jurisdiction, the proceedings before the Company Judge cannot be continued. These are substantial aspects having bearing on the rights of the parties and the power of the Court to proceed with the case. A decision on maintainability of the petition is, therefore, not a mere administrative or procedural order, but a substantive decision judicially made, holding that the court can exercise its jurisdiction at the instance of the petitioning creditors. The legal status of the petitioner from the point of view of his statutory empowerment to present the petition under section 439 (1)(b) is conclusively decided by negativing the preliminary objection and that judicial order can therefore be examined by the appellate Court under section 483 of the Act. The contention that since the stage of admission of the petition has not yet come and the decision on maintainability was anterior in point of time, and therefore, if admission order is not appealable (as was assumed), a fortiori, the order anterior in time cannot be appealable overlooks the fact that the appealability of a judicial order or decision cannot be made to depend on the chronology of time in which the

order is made or decision given, but would be determined on the basis of nature of the order or the decision. The impugned order finally decides the question whether the petitioners are authorized under section 439(1)(b) and 439(2) of the Act to invoke the winding up powers of the court by presenting these petitions and the appellants cannot be precluded from demonstrating before the appellate forum that the petitions cannot be proceeded with by the Company Court as its jurisdiction is not invoked by a person entitled to invoke it under section 439. The preliminary objection against the maintainability of the appeal is, therefore, misconceived and cannot be accepted.

11. The winding up petitions have been presented on the ground that the company is unable to pay its debts and that it is just and equitable that the company is wound up. The petitioner claiming to be the creditors on the ground that they were entitled to receive payment of the principal amount, outstanding interest payment and interest accrued from 31-1-2001 to 11-4-2001 in respect of the Floating Rate Unsecured Notes called upon the company to make payment of their dues in terms of the Notes in 21 days from the date of the notice of demand, failing which it would initiate legal proceedings for recovery of the amount including a winding up proceeding under the said Act. According to the petitioners, event of default was declared by the trustees of the Notes, who served notice on 23-2-2001 on the company stating that Notes were due and payable by the company for their full principal amounts together with the unpaid accrued interest. While the petitioners thus claim to be creditors entitled to file a winding up petition, the company has questioned the maintainability of the petition on the ground that they are not creditors within the meaning of section 439(1)(b) of the Act.

11.1 The petitioners in their notices of 12 / 16th April 2001 described themselves as creditors of the Company who were entitled to interest payments and extraordinary interest payment due in respect of the Notes and gave details of the amounts due by the company to the creditors calling upon it to pay the same as per the notice of demand, in 21 days. By letter dated 24th April 2001, the company called upon the petitioners' lawyer to give satisfactory evidence to show their individual status as creditors and the basis on which the claim was made by each of them in relevant amount. By letter dated 5-5-2001, the lawyer of the petitioners sent material to prove the status of the petitioners as creditors of the company. Thereafter, by letter dated

11th June 2001, the Company wrote to the petitioners' lawyer that the petitioners "are Noteholders and their rights are defined by the Deed of Trust dated September 15, 2000 and the terms of the Notes in question. If there is any "creditor", it is the trustee". The Company took up the stand that it cannot recognise the petitioners as its creditors and that the only creditor recognised by it in relation to the Notes was the Trustee -Chase Manhattam Trustee Ltd., who alone could receive payment and give a valid discharge. It will be noticed that the company admitted in its correspondence that the petitioners were Noteholders while disputing them to be the creditors.

11.2 Under section 439(1)(b), any creditor including a contingent or prospective creditor can present a petition for the winding up of a company subject to the provisions of section 439. The creditor of a company, in its ordinary parlance, would mean a person to whom the company is owing money and by section 439(1)(b), the meaning is extended to contingent and prospective creditors. "Contingent Creditor" means a creditor in respect of a debt which will only become due in the event which may or may not occur. "Prospective Creditor" would mean a creditor in respect of a debt which will certainly become due in future, either on some date which has already been determined or on some date determinable by reference to future events.

12. The question is whether the petitioners who have beneficial interest in the Notes can be said to be creditors. In order to judge whether the petitioners are creditors or not, it would be relevant to refer to the nature of their rights created by issuance of the Notes.

12.1 The Company offered to issue New Notes in the exchange offer which it solicited in exchange of the Old Notes which were also held in form of Global Notes and were deposited with a custodian and registered in the name of a nominee of the DTC. The participants of DTC held interest in the Old Notes as shown in the record of the DTC, Certain DTC participants held Old Notes for the benefit of Euroclear System, or Clearstream Banking. Each person who was the beneficial owner of a particular amount of the DTC Global Notes as shown in the record of the DTC participants, or a Clearing system, or their respective account holders, was required to convey its voting instructions directly or through the DTC participants or account holders through whom they held their interest in the Old Notes, to the DTC participants or Euroclear or Clearstream in accordance with their

procedures.

12.2 The Company declared its intention to have the New Notes issue in registered form, without coupon. It was declared that such New Notes "will be represented by interest in Global Registered Notes (the New DTC Restricted Global Notes), deposited with a custodian for and registered in the name of a nominee for DTC." It was declared that "Beneficial interests in the new DTC Global Notes will be shown on and transfers thereof will be effected only through, records maintained by the DTC and its direct and indirect participants, including depositories for Euroclear and Clearstream". Thus, the New Notes were to be represented by interests in the Global Notes. Under the arrangement, the Global Notes were to be registered in the name of the nominee of the DTC while the New Note Holders of interests in such Notes were to be shown in the relevant records. The nominee of DTC or DTC or the Trustee, thus, at the instance of the issuer company handled the Global Notes in which the New noteholders had their respective entitlements to the extent of their interests in such Global Notes. The Company also declared that it will reasonably endeavour to have the New Notes listed on the Luxemburg Stock Exchange to make them eligible to be cleared through the clearing system and to make them eligible for trading in the PORTRAL of the National Association of Securities Dealers Inc. Each person who was the "owner of a particular amount of the Old Notes, as shown on the record of the DTC or the DTC participants, or a Clearing System or their respective account holders", was entitled only to attend and vote at the meeting though such beneficial owners were not to be Noteholders for the purpose of the meeting. New Notes were to be issued only in denomination of US $ 1000 and integral multiples thereof.

12.3 As per the arrangement, the new DTC Global Notes were to be deposited with the custodian for DTC and registered in the name of the nominee of the DTC and the custodian with whom the new DTC Global Notes are deposited and DTC would electronically record the principal amount of the New Notes held within the DTC system. The participants of the DTC were to hold interest in the New notes as shown in the records of the DTC. Certain DTC participants were to hold New Notes for the benefit of Euroclear and Clearstream. It was declared that, "Each person (a New Beneficial Owner) who is the owner of a particular nominal amount of the New Notes, will be shown in the records of the DTC or the DTC participants or a Clearing System (i.e. Euroclear or

Clearstream or both as per the Glossary attached for the purpose of the Exchange Offer and Consent Solicitation) or their respective account holders.

12.4 As per the mode of payments, the payments of the principal of and interest on each new DTC Global Notes registered in the name of DTC's nominee was to be made to or to the order of the nominee as the registered owner of such Note. It was declared that the Company expected that the nominee, upon receipt of any such payment, "will immediately credit DTC participants accounts with payments in the amounts proportionate to their respective New Beneficial Owners of the principal amount of the relevant new DTC Global Notes as shown on the records of DTC or the Nominee".

12.5 Transfers of Interest in the new DTC Global Notes with DTC, Euroclear and Clearstream could be made in accordance with the usual rules and operating procedures of the relevant system. Transfers may be made at any time upon request to any Transfer Agent (as defined in the Trust Deed) by the holder of an interest in the new DTC Unrestricted Global Note to a transferee who wishes to take delivery of such interest through a new DTC restricted Global Note. It was mentioned that "Transfers at any time by a holder of an interest in a new DTC Restricted Global Note to a transferree who takes delivery of such interest through a new DTC Unrestricted Global Note will be made only upon delivery to any Transfer Agent of a certificate giving details of the account at Euroclear or Clearstream, as the case may be, and DTC to be credited and debited respectively with an interest in such new DTC Global Notes". DTC a limited purpose trust company, was created to hold securities for its participants and facilitate the clearance and settlement of security transactions between the participants through electronic book-entry changes in the accounts of its participants, thereby eliminating the need for physical movement of certificates. Participants included securities brokers and dealers, banks, trust companies, clearing corporations etc. as declared under the head of "Transfer of Notes" in the exchange offer documents.

12.6 The terms of the exchange offer were treated as part of the Letter of Election which was required to be executed by the Noteholders. The word "Noteholder" for the purpose of the exchange offer was defined in the glossary attached for the exchange offer to mean, a direct or beneficial holder of one or more Old Notes.

13. As per the terms and conditions of the Notes, "the Noteholders are entitled to the benefit of and are bound by, and are deemed to have notice of, all the provisions of the Trust Deed and are deemed to have notice of those applicable to them of the Agency Agreement". Title to the Notes passed by and upon registration in the Register, and, in the conditions of Notes, expression "Noteholder" and "holder" meant the person in whose name the Note was registered in the Register and the holder of any Note was to be treated as its absolute owner (except as otherwise required by law), for all purposes. Notes could be transferred in whole or in part and all transfers of Notes and entries on the Register were to be made subject to the detailed regulations concerning transfer of Notes, scheduled to the Agency Agreement. The Notes constituted (subject to the condition 4 regarding negative pledge) Unsecured obligations of the issuer. Interest payments dates were mentioned in the Notes. Condition No.7(a) prescribed the method of payment under which it was provided that; "Interest on Notes will be paid to the persons shown on the Register at the close of business on the 15th day before the due date for the payment of interest". As noted above, each person (a New Beneficial Owner) who is the owner of a particular nominal amount of the New Notes was to be shown in the record of the DTC or the DTC participants or a clearing system or their respective account holders. The beneficial owners of particular nominal amounts of the New Note were thus entitled to the payments made in proportion to their interest in the Note.

13.1 As per Condition 8 (Taxation) of the Notes, all payments of principal and interest in respect of the Notes were to be made free and clear of and without withholding or deduction for, any taxes or governmental charges etc. unless such withholding or deduction was required by law, in which event additional amounts were to be paid by issuer company matching the withheld or deducted amounts except to a holder or to a third party on behalf of a holder, who is liable to such taxes by reason of his some connection with India other than the mere holding of the Note. Clause 8(b) contemplated indemnity in respect of claim for taxes on transfer and sale of any Notes "or any beneficial interest therein" outside India by a person who is not a resident nor ordinary resident in India.

14. As per the terms of the Trust Deed, the transferee was to hold the benefit of the "covenant to pay" (clause 2.2) and other covenants of the issuer

company under the Trust Deed on trust "for itself and the Noteholders according to their respective interests". Under clause 3.1 of the Trust Deed, the Notes were to be issued in the name of a nominee for the Depository Trust Company. The Issuer company was to indemnify the company and the Noteholders from and against all taxes paid by any of them in connection with any action taken by the trustee, or as the case may be, the Noteholders to enforce the obligations of the issuer company under the Trust Deed or the Notes. Declaration of trust was made in clause 5 of the Trust Deed as per which if the Trustee holds any moneys which represent principal or interest in respect of the Notes in respect of which claims have been prescribed, the Trustee will hold money on the trusts declared in this clause. All moneys received in respect of the Notes or amounts payable under the Trust Deed were to be held by the Trustee on trust to apply them (subject to the accumulation clause 5.2) despite any appropriation of all or a part of them by the Issuer company; first, in payment of costs, charges, expenses and liabilities incurred by the trustee including his remuneration in carrying out its functions; secondly, in payment of any amounts in respect of the Notes pari passu and rateably and, thirdly, in payment of any balance to the Issuer company for itself. Clause 8.1 of the deed, inter alia, contemplated accrual of remuneration to the Trustee from the date of withholding or refusal until payment to a Noteholder of moneys due in respect of any Note which was improperly withheld. Clause 9.16 provided that, so long as any DTC Global Note is held on behalf of a clearing system, in considering the interest of Noteholders the Trustee may have regard to any information provided to it by such clearing system or its operator as to the identity either individual or by category of its account holders or participants with entitlements to any such DTC Global Note and may consider such interests as if such account holders or participants were the holders thereof. The Trust Deed thus clearly recognised the interests of account holders or participants having entitlements to a DTC Global Note by treating them as if they were the holders of the Note.

15. The above provisions of the exchange offer and solicitation of consent, the Trust Deed and the Notes clearly bring to fore that though the Global Notes were to be issued in the name of the nominee of the DTC, the proceeds of these Notes came from the investors who by virtue of the nature of a Global Note could own particular nominal amounts of the New Note to the extent of their investments. The persons who owned such entitlements were the beneficial owners of the Note and

the names of such persons who were beneficial owners were to be entered in the records of the DTC, DTC participants or clearing system or their respective account holders. The payment of and interest on each New Note registered in the name of the nominee of the DTC was to be immediately credited to their accounts in the amounts proportionate to their respective beneficial ownership, as per the standing instructions and customary practices applicable to securities held for the accounts of customers registered in the names of nominees for such customers. The petitioners were thus to receive the principal amounts and interests relatable to the particular nominal amounts of Notes of which they were the beneficial owners as per the records of the DTC, DTC participants or a Clearing System or their respective account holders. When DTC Global Note is held on behalf of a clearing system, the Trustee in considering the interest of Noteholders, the account holders or participants with entitlements to such Note, may consider such interests as if they were the holders of the Notes, as per clause 9.16 of the Trust Deed. The interest amount due on the Notes was to be paid to the respective persons shown in the Register as per clause 7 of the conditions of the Notes and the entitlements in Notes were transferable. The incident of tax deduction at source was on the holder or a third party of a holder who had connection with India other than mere holding of the Note as per clause 8 of the taxation and not on the Trustee. The device of issuing a Global Note with a view to offer transferable entitlements in portions of the value of such Note and to provide for the DTC who will in the name of its nominee keep the Global Note, and the Trustee to oversee the transactions taking place from time to time as the Registrar during the period that it was operative and to decide upon the events of default as also to apply the moneys, were all the arrangements made by the Issuer company to facilitate raising of finances for itself from the investors while keeping such investors as third parties to this arrangement made with the DTC and the Trustee. Non-recognition of the beneficial owners, having entitlement in the Global Note of particular amounts as per their respective investments, as creditors would open up a door to defraud the investors, should the company issuing the Notes and its creature the Trustee who is on its pay roll line up on one side and choke up a process warranted for recovery of the dues or even a winding up proceeding that may be warranted against the company at the instance of such creditor beneficiaries and on just and equitable grounds. The right of the beneficial owners, who had invested in the Global Notes to recover the amounts when due from the

issuer company who ultimately was, under its arrangement, bound to pay, cannot be thwarted by the issuer company by creating intermediaries to arrange the management of the Global Notes for its convenience.

16. The doctrine of privity of contract is subject to many exceptions and it has long been settled that where "A" makes a promise to "B" for the benefit of "C", the promise can be enforced by "C" against "A" if "B" has constituted himself trustee of "A's" promise for "C". (See para 19.065 Chapter 19 at page 998 Chitty on Contracts, Volume I, 28th Edition). Two consequences generally flow from a finding that there is a trust in favour of a third party. First, the third party is entitled to sue the promisor for the money which the promisor had promised to pay to which it is beneficially entitled. But, such third party must join the promisee as a party to the action since otherwise, the promisor might be sued a second time by the promisee. This rule as to joinder of parties exists for the benefit of the promisor and he can waive it. Secondly, since the third party is beneficially entitled to the money, the promisee has no right to such money. (See para 19.070 Chitty on Contracts, Volume I, 28th Edition). In the present case, the third party beneficial owners could therefore sue the Company (promisor) and the Trustee (promisee) to recover the money to which they were beneficially entitled as persons on record to whom the payments of principal and interest that had accrued in proportion to their entitlements in the Global Note was to be made through the medium of the trust. A clause in a contract for the promissor to pay the proceeds of the third party is enforceable by the third party, where the payment is intended to satisfy a present or future liability of the promisee to the third party. The third party in such situation is traditionally referred to as "creditor beneficiary" and has been accorded full rights to sue under the original contract. (See D & H Distributing Co. v. The United States, decided on December 12, 1996 by the United States Court of Appeals for the Federal Circuit 96 - 5063).

16.1 As a general rule, one may not sue on a contract to which he is not a party unless the contract was made for his benefit. In contracts entered into for the benefit of persons other than the parties, there can be mainly three types of third party beneficiaries; first, where the performance of the promisee will constitute a gift to the beneficiary, the beneficiary is a "donee-beneficiary". Second, if no purpose to make a gift appears from the terms of the contract and the

performance of it will satisfy an actual or supposed asserted duty of the promisee to the beneficiary, the beneficiary is a creditor beneficiary. Third, in all other cases, the beneficiary is deemed to be incidental beneficiary. A donee or creditor beneficiary has a right to enforce contracts made by others for his benefit. Incidental beneficiaries do not have that right.

16.2 Even though the trust deed was executed between the Issuer company and the Trustee, the investors like the petitioners, who are creditor - beneficiaries, though third parties to the Trust Deed, can enforce their claim both against the promisor and the promisee i.e. the Issuer company and the Trustee in view of the contract being entered into between them for their benefit by offering them transferable entitlements in the Global Notes being the securities in which the persons were lured to invest for returns. There is no compelling reason of principle or policy which should preclude such creditor - beneficiaries from enforcing their rights when the Trustee fails to safeguard their interests.

16.3 The terms of contract between the Issuer company and the Trustee clearly demonstrate that the parties intended to benefit the third party investors like the petitioners. In other words, there were third party beneficiaries of the contract between the Issuer company and the Trustee in respect of the Global Notes which were the subject matter of that contract. It appears from the terms of the contract between the Company and the Trustee that the performance of it would satisfy an actual or supposedly asserted duty of the promisee i.e. the Trustee to the beneficiary and therefore, the beneficial owners were the creditor-beneficiaries. A creditor-beneficiary has the right to enforce contracts made by others for his benefit. The creditor - beneficiaries are intended beneficiaries of the contract and not mere incidental beneficiaries. The terms and conditions of the Trust Deed and the Global Notes covered by it showed a clear intent to have the contract operate for the benefit of the third party investors. Not only the "intent to benefit" test, but also "the duty owed" test are both satisfied since the contracting parties intended to benefit the third party investors in the Global Notes and the performance of the promisor i.e. the company would otherwise discharge a duty owed to such third party beneficial owners. If the promisors performance will satisfy a legal duty that the promisee owes a third party, the third party is a creditor beneficiary and may enforce the contract against the promisee and the promisor. It is not even necessary that

the contract, in the present case, the Trust Deed, identify or refer to the intended beneficiary by name. The creditor beneficiary may recover if he can show that he is one of a class of persons for whose benefit the contract was made. Thus, if payment was released by the Issuer Company as stipulated in the conditions of the Global Notes and the Trust Deed, that performance would have discharged the trustee's obligation.

16.4 It will be significant to note that the term "creditor(s)" in section 439(1)(b), is used in context of a person's right as a creditor and not in context of any remedy for enforcement of that right or its realisation. Existence of a person's right as a creditor will not necessarily depend upon his remedy to enforce it which may be hedged or eclipsed for the time being. It is not unknown to law that creditors remedies are often suspended as a relief to an undertaking or to nourish a sick one to health. The creditors' rights, however, do not get extinguished. Section 439(1)(b) lays down that, a person should be creditor for being able to petition. There is no warrant for superimposing any further requirement that such creditor must necessarily be a creditor who has a present right to recover the debt by a suit. The section does not say that nobody shall petition unless he has a right to sue. The Chancery Division in Re North Bucks Furniture Depositories Ltd. (supra), in context of section 170 of the Companies Act, 1929 (which corresponded to section 439(1)(b) of the Companies Act, 1956) held that section 170 did not say that nobody shall petition unless he had a right to sue but a person to have the right to petition must be a creditor. The creditors of a company for the purpose of section 439(1)(b) would ordinarily be those would have been creditors had the company gone into liquidation i.e. those having pecuniary claim whether actual or contingent against the company.

16.5 The case before us presents a clear instance in which the third parties' interests specifically protected by the contract between the Issuer Company and the Trustee in form of the Trust Deed, would be impaired if these creditor beneficiaries were not accorded right to obtain relief against the promisor i.e. the Company in the event of a breach. We hold that the petitioners who are creditor beneficiaries are creditors within the meaning of section 439(1)(b) and can present a winding up petition as creditors.

17. Though the finding that a third party who is intended beneficiary like a creditor beneficiary is

entitled to enforce the terms of the contract i.e. the Trust Deed which was entered into for the benefit of the beneficial owners of the Global Notes and therefore, a creditor within the meaning of section 439(1)(b) should be sufficient to uphold the maintainability of the petition, since the preliminary objection was raised by the appellants straight under sub-section (2) of section 439, without reference to section 439(1)(b), by contending that even if the petitioners are Noteholders, they are not holders of debentures, or holders of "any securities" as contemplated by section 439(2) read with section 2(12) and 2(45AA) of the Companies Act read with section 2(h) of the Securities Contracts (Regulations) Act, 1956 (SCRA), it would be necessary also to consider that aspect of the matter especially when the objection in this vein is reiterated by the learned Senior Counsel for the appellants before us. The learned Single Judge has negatived this contention on the ground that the Notes in the present case fit into the definition of the expression "debentures" since different persons were having a share in the Global Notes and the issuer company had promised to return the amounts covered by the Notes at their maturity and to pay quarterly interest on the principal. It was held that all the ingredients of a debenture were fully satisfied and there was no reason why the Notes cannot be treated as debentures as contemplated by sub-section (2) of section 439 of the said Act.

17.1 The word "debenture" as defined in section 2(12) includes debenture stock, bonds and any other securities of a Company whether constituting a charge on the assets of the company or not. The word "securities" as defined by section 2(45AA) of the Act means securities as defined in clause (h) of section 2 of the SCR Act and includes hybrids. Under section 2(h)(i) of the SCR Act, securities include shares, scripts, stocks, bonds, debentures, debenture stock or other marketable security of a like nature in or of any incorporated company or other body corporate. The contention raised on behalf of the appellant is that, unless a security in question is a marketable security, it cannot be a debenture and since the Global Note was not a security marketable in India, it was not a "debenture" within the meaning of section 2(12) of the said Act. The question that arises for our consideration, therefore, is whether these Notes issued by the appellant company fall under the category of instruments that are securities.

17.2 The fundamental purpose underlying Securities Acts is to eliminate serious abuses in a largely

unregulated securities market. There is virtually limitless scope of human ingenuity especially in the creation of the numerous schemes devised by those who seek the use of money of others on promise of profits. The inclusive definition of the term "security" is wide enough to include within that definition many types of instruments that might be sold as an investment.

17.3 In order that the interest of investors are protected, it was decided that SEBI would frame regulations with regard to collective investments schemes. It was therefore proposed to amend the definition of "Securities" so as to include within its ambit the derivatives and the units or any other instrument issued by any collective investment scheme to the investors in such scheme (See Statement of Objects and Reasons of the SCR Act and the Amendment Act).

17.4 The term "Note" is relatively broad to encompass instruments having different characteristics depending on whether issued in a consumer context as a commercial paper or in some other investment context. If the Notes are issued in a commercial or consumer context, they will not be treated as securities while those issued in investment context would be securities. Whether the Note is issued in investment context can be ascertained on the basis of the circumstances surrounding the transactions. In order to determine whether a transaction involves a "security", the transaction has to be examined to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the Note is expected to generate, the instrument is likely to be a "security". On the other hand, if the Note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, or to advance some other commercial or consumer purpose, such Note cannot be classified as "security". One other factor to be examined would be whether the Note in question is an instrument in which there is common trading for speculation or investment and how is it viewed by the investing public [See REVES v. ERNST & YOUNG, 494 U.S. 56 (1990)].

17.5 The new Global Notes were issue by the appellant company in exchange for the Old Notes in its bid to pursue a global restructuring plan. This was necessitated because the company was in payment default on certain of its obligations due to financial difficulties as declared in the Exchange Offer documents,

in which it was mentioned: "As a result of its financial difficulties, the company is seeking global restructuring of its debt with the goal of lengthening the maturities of its debt obligations" under sub-head "Financial Condition" on internal page 7 of the "Summary of Exchange Offer and Consent Solicitation". Therefore, the new Notes were issued by the company in context of the finances of its business. The investors were offered interest on their investments in the Notes and they could transfer their entitlements as per the terms and conditions of the Notes which means, there was a scope of common trading for speculation and investment in these Notes. They were obviously not a mere commercial paper and the raising of finance and investment test is squarely satisfied from the attributes of these Notes making them marketable securities and therefore, "debenture" within the meaning of section 2(12) of the said Act. Under Section 2 (h)(iii) of the SCR Act of 1956 even rights or interest in securities are included in the meaning of "securities".

17.6 The contention that the other provisions of the SCR Act, 1956, controlling and regulating the business of dealing in securities in the areas notified should be read alongwith the definition of "securities" which is incorporated by reference by section 2(45AA) under the said Act from section 2(h) of the SCR Act of 1956, is contrary to the elementary canons of construction. When a definition of a term is incorporated by reference from another statute, it is deemed to have been "cut and pasted" in the incorporating statute and that is all. Thenceforth, it is to be read as if it is a part of the incorporating statue in the context of its own provisions. The provisions in which it appears in the other statute do not accompany it in the incorporating statute. The definition of securities is to be read as if enacted in the said Act in the same words as it appears in section 2(h) of the SCR Act, 1956. If what the learned Senior Counsel for the appellant argues is right that the marketable securities should be marketable in India, it would amount to reading the other provisions of the SCR Act 1956 in the Companies Act, though not meant to be incorporated at all. Moreover, an anomalous position will arise, because, in the definition of "debenture" in section 2(12) of the said Act, there will be debentures, debenture stock, bonds, that are marketable anywhere but the "other securities" which are also debentures would be such as can be marketable in India only. No such dichotomy is warranted by any process of interpretation. This position clearly emerges from the decision of the Apex Court in Sham Rav (supra),

Mahindra & Mahindra Ltd. (supra) and M/s Omkar Nand (supra).

18. As the arguments progressed, the learned Senior Counsel for the appellant developed a contention that the concept of English Law reflected in Dundarland (supra) and Uruguay (supra), that a debenture holder is not a creditor while the trustee of debenture holders would be, is required to be kept in mind while reading sub-section (2) of section 439 and sub-section (2) should be read as an Explanation to that section 439 (1)(b) so as to mean that if a person is not a holder of a debenture, he cannot fall back on section 439(1)(b) to say that he is a creditor by virtue of being a beneficial owner of an interest in the debenture. Furthermore, if he is not a holder of the debenture, he cannot claim to be one by resort to the definition of "securities" in section 2(h)(iii) of the SCR Act of 1956.

18.1 On a plain reading of section 439(1)(b) and 439(2) of the said Act, it is clear that the provisions are meant to give a wide meaning to the term "creditor", who can present a winding up petition. The ambit of section 439(1)(b) is in no way curtailed by section 439(2), but in fact it is enhanced by making secured creditors as well as holders of debentures and the trustees as deemed creditors. The purpose underlying sub-section (2) of section 439 is to dispel any doubt against treating them as creditors and add to the range of sub-section 1(b) of section 439 of persons who are eligible as creditors authorized to present a winding up petition. The term "debenture" in sub-section (2) of section 439 has to carry the meaning assigned to it in section 2(12) of the said Act and would include "any securities" which in turn in view of the definition of "securities" incorporated by reference under section 2(45AA) of the said Act would include interest or right in securities. Therefore, a holder of a right or interest in securities would be holder of a debenture under section 439(2) of the said Act. A holder of beneficial interest in the security will thus be a deemed creditor under section 439(2) for the purpose of section 439(1)(b) of the said Act.

18.2 The learned Senior Counsel heavily leaned on the ratio of the decisions of the Chancery Division in Dunderland (supra) and Uruguay (supra) for his contention that a debenture holder did not have an immediate right of action for money lent or for money due, because the company is liable to pay the Trustees under Trust Deed and therefore, the company cannot be sued twice over.

The argument one had hoped had been decently interred by the provision of section 439(2) of the said Act and by the decision of the Bombay High court in Toprani's case (supra) and other decisions referred to above, but its ghost still walks on occasions, and this, it appears, is one of them. The objection that the company may be sued twice over by the trustee is wholly inapposite in the context of a winding up petition which once presented, there would be no additional burden faced by the Company as in suits by different persons on the same cause. The winding up proceedings being the proceedings in rem, it would turn on an entry to the proceedings for all those who want their claims to be proved under section 528 of the Act. There is no question of duplication of proceedings involved as may be the case when a beneficiary enforces the claim by way of a suit which claim the Trustee may also try to enforce. That analogy simply cannot apply to a winding up proceedings initiated by any creditor.

18.3 In M.C.Chacko v. The State Bank of Travancore, reported in AIR 1970 SC 504, the Supreme Court has held as under :

> "It has, however, been recognised that where a trust is created by contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract, his rights are equitable and not contractual. The judicial committee applied that rule to an Indian case Khwaja Muhammadkhan v. Husaini Begum [(1910) 37 I.A. 150]; (1910 ILR 32 All. 410. .... It must, therefore, be taken as well settled that, except in case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract."

18.4 The term "debenture" in section 2(12) of the said Act would therefore in our opinion include any securities of a company including the Global Notes and also rights or interest in such Global Notes as those of their petitioners who are the beneficial owners having the entitlements in portions of the Global Notes which are securities of the company. We therefore hold that these petitioners-beneficial owners of interest in these securities were debenture holders and are deemed to be creditors within the meaning of section 439(2) of the Act and negative the preliminary objection of the appellant against the maintainability of the petitioner.

19. The contention that the petitioners are precluded from filing any proceedings including winding up proceedings is based on clause 13 of the Conditions of the Notes which reads as under :

"Enforcement :

At anytime after the Notes become due and payable, the Trustee may, at its discretion and without further notice, institute such proceeding against the issuer as it may think fit to enforce the terms of the Trust Deed and Notes, but it need not take any such proceedings unless (a) it shall have been so directed by an extraordinary resolution or so requested in writing by Noteholders holding atleast one-fifth in principal amount of the Notes outstanding, and (b) it shall have been indemnified to its satisfaction. No Noteholder may institute proceedings directly against the issuer unless the trustee, having become bound so to proceed, fails to do so within a reasonable time and such failure is continuing."

19.1 The condition 13 of the Note reproduced above provides that after the Notes become due and payable, the Trustee has a discretion to institute proceedings against the Issuer i.e. the Company to enforce the terms of the Trust Deed and the Notes, but he need not take such proceedings unless he is directed and is indemnified, as contemplated by the Trust Deed under clauses 8.4 and 6.1. Under clause 6.2 of the Trust Deed, the Trustee may institute legal proceedings against the Issuer Company to enforce any obligation under the Trust Deed and the Notes. Clause 8 though dealing with remuneration of the Trustee contemplates that the payment due under the Notes is to be made by the Issuer Company to the Noteholder.

19.2 In the present case, the Trustee had already determined the event of default under clause 9.1.3 by issuing letter dated 15-2-2001 on the Company, and that declaration was binding on the company and the Noteholder. By letter dated 23-2-2001, the Trustee called upon the company to repay the principal amount together with the accrued interest. Proof that the Trustee company has failed to pay a sum due to the holder in respect of any Note will (unless the contrary be proved) be sufficient evidence that it has made the same default as regards all other Notes in respect of which sums are then due, as stipulated in clause 11.2 of the

Trust Deed. After the Trustee was urged by the company by its letter dated 30-4-2001 not to take any further precipitated action at the behest of the loan Noteholders who, as mentioned in the letter, had through their Indian lawyer threatened to commence legal proceedings, including winding up proceedings, the Trustee on 2-5-2001 informed the company that it "cannot unilaterally agree to confirm that the notice of default was of no effect" and left it to the company to call a meeting of Noteholders for considering its proposal. The Trustee taking note of the fact that the lawyers acting on behalf of certain Noteholders i.e. petitioners had threatened to commence legal proceedings against the company stated; "We consider this is a matter between ESSAR and Noteholders". Again by letter dated 19-2-2002, in response to the company's fax letter of 15-2-2002, requiring the Trustee to restrain the Noteholders from proceeding ahead with the legal proceedings initiated by them against the company (i.e. the present winding up proceedings) and to intervene on behalf of the company for stating that, as per the Trust Deeds, the individual Noteholders i.e. the petitioners do not have any locus to file winding up petitions against the Company, the Trustee refused to do so by stating that, enforcements contemplated by clause 6 of the Trust Deed and Condition 13 of the Note were in relation to the Trust Deed and the Notes and these petitions were not for such enforcement, but were for winding up of a company in which the fact that Notes were due and owing constituted the basis of a debt on which the petitions were presented. The Trustee disagreed with the company that there was no privity of contract between the company and the individual Noteholders and denied that the Trustee was a creditor. It was made clear that : "The Trustee does not have the ability or intention to restrain the Noteholders from proceeding with the legal proceedings initiated by them against the company." In the above background, this was a clear case where the Noteholders were entitled (even on an assumption that winding up proceeding was one such proceeding which in fact was not included under condition 13) to prefer the proceedings under the latter part of condition 13 under which a Noteholder could institute proceedings directly against the Issuer company when the Trustee having been bound to so proceed, fails to do so within a reasonable time and such failure is continuing. The settlement of a trust creates a right in personam against the trustee and an equitable right in rem in the beneficiary. The most fundamental duty owed by the trustee to the beneficiary of the trustee is a duty of loyalty. This duty is imposed upon the trustee not because of any provision in the terms of the trust deed,

but because of the relationship which arises from the creation of a trust. A private trust requires a beneficiary definitely ascertained at the time of creation of the trust or definitely ascertainable within the period of the rule against perpetuity. This is the typical trust in which there is both an equitable right in rem and an equitable right in personam in the beneficiary. (See Jurisprudence by Roscoe Pound Volume V Part 8, the System of Law. pp. 240-241).

19.3 Even if it is assumed that it was the Trustee who was required to present the winding up petition, the Trustee clearly was not wanting to do so on the ground that it was not its job under the terms of the Trust Deed to file a winding up proceeding. The Trustee was bound to show a degree of care and diligence required of it as a Trustee as per clause 10 of the Deed. The Trustee could not have waived the default unless in its own opinion, the interest of the Noteholder was not to be materially prejudiced, as contemplated in clause 11(1) of the deed. This is why, the Trustee refused to agree in its letter of 2nd May 2001 to the company's request that the notice of default from the Trustee should be treated as of no effect and insisted that the Notes were properly called due and payable. The Trustee in its letter dated 19-2-2002 has taken a stand that it is not the creditor and that the winding up proceeding is a matter between the company and the Noteholders. Therefore, the Noteholders were perfectly within their rights as creditors to present the winding up proceedings in which, according to the Trustee, it had no voice having regard to the nature of such proceedings which were not merely for enforcement of the Trust deed and the Notes.

19.4 The nature of a winding up proceeding under section 439 of the said Act is obviously different from mere enforcement of payment of the dues under the Note or Trust Deed. Clause 13 of the conditions of the Notes does not contain any specific reference to winding up proceedings which some Trust Deeds or Notes may contain and rightly so, because, in the context of section 9 of the said Act, such a condition against the provisions of the Act by which the creditors are enabled to present a winding up proceedings would be void. Clause 13 only refers to the discretion of the Trustee to institute such proceedings against the Issuer as it may think fit "to enforce the terms of the Trust Deeds and the Notes". The subject of winding up of the Issuer company could not have depended on the conditions of the Trust Deed or the Notes. In fact, winding up was not a term or condition of the Trust Deed or Notes. The nature of the

proceedings contemplated by the enforcement clause 13 of the conditions of Notes was obviously proceedings in personam for recovery of the dues from the issuer company under the Trust Deed and Notes which would be principal and interest and remunerations, expenses and indemnities for the beneficial owners or the Trustee, as the case may be. The winding up proceedings under section 439 are not proceedings for recovery of dues, but are proceedings in rem based on statutory grounds on which a company may be wound up by the Court such as, a company being unable to pay its debts or if the Court is of the opinion that it is just and equitable that it should be wound up as contemplated by clauses (e) and (f) of section 433 of the said Act. The jurisdiction of the Company Court does not extend to mere enforcement of the terms of the contract of the parties to satisfy a claim of a creditor made under it. The function of a court in a winding up proceedings is not to decide matters of recovery of a particular debt owed by the company to any person, but to examine whether there exists any circumstances on the basis of which the company is liable to be wound up. The reliefs granted by a court in a winding up petition are different from the reliefs in an inter-partes enforcement action. Therefore, ability to give a valid discharge test cannot be applied to a creditor beneficiary who is a creditor within the meaning of section 439(1)(b) and can knock at the door of the Company Court to draw its attention to the circumstances that warrant winding up of the company. The inquiry in the present case will be, whether there is inability on the part of the company to pay its debt and / or whether it would be just and equitable to wind up the company. That has nothing to do with the question of creditor's ability to give a valid discharge, because, a creditor who moves the court may ultimately be offered nothing.

19.5 Above all, no term of agreement can prevail over the statutory provision enabling the creditor to present a winding up petition. This clearly follows from the provision of section 9(b) of the Act which, inter alia, provides that, save as otherwise expressly provided in the Act, any provision contained in the agreement or resolution of the company shall to the extent to which it is repugnant to the provisions of the Act, become or be void, as the case may be.

20. The trustee is appointed by the company, is remunerated and indemnified by it and can even be replaced as per the terms of the Deed. The Trustee has to safeguard the interest of the beneficiaries and it was justified in not acting as a puppet of the company. In

view of what we have said hereinabove , we hold that the winding up petitions are maintainable at the instance of the petitioners Noteholders who are beneficial owners, and, since the interests of other Noteholders may also be involved, the Trustee would be a proper party to assist the company court in the proceedings and it was therefore absolutely correct on the part of the learned Single Judge to direct the Trustee to be impleaded as a party to these proceedings. As noted hereinabove, even the company, has in terms, pleaded that the Trustee was a necessary party, and, obviously therefore, it cannot grudge against that direction. However, these petitions are maintainable even at the instance of the Noteholders in their own capacity as creditors. It is not even the Trustee's stand, as is clear from the aforesaid correspondence, that it did not take the proceedings, because, there was no requisite resolution passed by the Noteholders as contemplated by clause 13. The stand of the Trustee rightly is that the winding up proceedings are not contemplated by clause 13 and that the Noteholders who are the creditor beneficiaries were free to initiate them since the Notes had become due and payable by virtue of the Trustee having issued notices to the company demanding repayment as per the terms and conditions thereof. Thus, there is no substance in the preliminary objection that even if the petitioners are creditors, they do not have an enforceable claim in view of clause 6 of the trust deed or condition 13 of the Notes.

21. For the forgoing reasons, we are unable to accept the contentions raised on behalf of the appellant and find ourselves in agreement with the impugned decision of the learned Single Judge overruling all the preliminary contentions raised on behalf of the appellant. The appeals are, therefore, dismissed. There shall be no orders as to costs. The Civil Applications are rejected and the interim relief stands vacated.

[R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

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